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Supreme Court, U.S.
FILED

No. _____

03-1572 MAY 19 2004

In The

Supreme Court of the United States

TERRY JORGENSEN,

Petitioner,

v.

JOHN CASON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY WHERE THERE WAS NO REQUISITE SHOWING OF IMPERIOUS NECESSITY?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Basis of Jurisdiction in this Court	1
Constitutional Provisions	1
Statement of the Case	2
Reasons for Granting Writ	5
Conclusion	11

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Washington, 434 U.S. 497 (1977) ..... *passim*

Critz v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978) 6

Downum v. United States, 372 U.S. 734, 83 S.Ct. ___, 10 L.Ed.2d 100 (1963) 6

People v. Benton, 402 Mich. 47, 260 N.W.2d 77 (1977) 6

People v. Brower, 164 Mich. App. 242, 416 N.W.2d 397 (1987), *lv. den.*, 430 Mich. 864 (1988), *cert. den.*, 488 U.S. 933 (1988) 6

People v. Dawson, 431 Mich. 234, 427 N.W.2d 886 (1988) 6

People v. Echavarria, 233 Mich. App. 356 (1999) 6

People v. Rutherford, 208 Mich. App. 198, 526 N.W.2d 620 (1994) 6

Williams v. Taylor, ___ U.S. ___, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) 5

CONSTITUTIONS

U.S. Constitution, Amendment V 1, 5

U.S. Constitution, Amendment XIV, Section 1 ..... 2, 5

Mich. Const. 1963, art. 1, § 15 5

STATUTES

28 U.S.C. § 2254(d)(1) 5

Michigan Compiled Laws § 750.520b 2

TABLE OF AUTHORITIES – Continued

Page

Michigan Compiled Laws § 750.520b(1)(B) 4

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) 5

OPINIONS BELOW

The opinions of the Courts below are unpublished, and have not been designated for publication.

BASIS OF JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals in the Sixth Circuit was entered on February 19, 2004. This petition is being filed within ninety (90) days of that date as required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 10(c).

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment XIV, Section 1 provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Terry Jorgensen was charged in an eight (8) count information filed in the Macomb County, Michigan, Circuit Court, with violation of Michigan Compiled Laws (M.C.L.) § 750.520b, criminal sexual conduct – first degree. At trial, voir dire was conducted and completed, and the jury was sworn and impaneled. Following voir dire, it was agreed that the parties would make their respective opening statements, and the jury would then be dismissed for the day, to return the following morning as the prosecution began his case-in-chief. After the prosecution's opening statement, defense counsel made his opening statement, without objection from the prosecutor.

After defense counsel concluded his opening statement, the prosecutor moved for a mistrial, claiming prejudice on the basis that during his opening statement, defense counsel had stated that the complainant had never known his biological father because he was serving a prison sentence for rape.

Defense counsel argued that there had been no prejudice to the prosecution but, that if the Court believed a remedy was in order, a curative instruction to the jury would resolve the issue. Petitioner objected to the motion for mistrial.

Over counsel's objection, the trial court declared a mistrial stating that the remark had no probative value and was unnecessary. The trial court did not make a finding of manifest or imperious necessity justifying the mistrial, nor make a finding that a curative instruction, so requested by Petitioner, was not a reasonable alternative to declaring the mistrial.

Prior to commencement of the second trial, on December 7, 1999, Petitioner's pretrial motion to dismiss was heard and denied by the trial court. This motion to dismiss asserted that retrial was barred by double jeopardy protections and, therefore, the case must be dismissed. At the conclusion of the hearing, Judge Chrzanowski held: " . . . based upon my analysis, I felt that that jury **could have been prejudiced**." (Emphasis added). Thereupon, the trial court denied the motion and scheduled the matter for trial the following week such that Petitioner could seek interlocutory relief.

On December 13, 1999, interlocutory relief was denied by the Michigan Court of Appeals for failure to persuade the court of the need for immediate appellate review. Trial commenced for a second time on December 14, 2000 and continued through December 15, 2000, until Petitioner's plea was tendered.

On December 15, 1999, Petitioner pled guilty to three counts of criminal sexual conduct-first degree, contrary to M.C.L. § 750.520b(1)(B), and in exchange the prosecution dismissed the five (5) remaining counts of same, recommending a sentence of 10 to 20 years, Macomb County Circuit Court Judge Mary Chrzanowski presiding. On January 26, 2000, Judge Chrzanowski sentenced Petitioner to a 20 to 40 year term of incarceration on counts I, II and III to run concurrently, and counts IV, V, VI, VII and VIII were dismissed on the prosecution's motion.

Petitioner unsuccessfully appealed his conviction and sentence through the Michigan court system.

Petitioner then filed the Petition for Writ of Habeas Corpus which is the subject of this appeal. The case was assigned to the Hon. Marianne Battani, United States District Judge. Judge Battani denied relief without a hearing, and entered a Judgment dismissing the said Petition, but thereafter granted a Certificate of Appealability as to the issue raised herein.

On February 19, 2004, the United States Court of Appeals in the Sixth Circuit issued an order affirming Petitioner's conviction, citing extensively from *Arizona v. Washington*, 434 U.S. 497 (1977), reasoning that because Petitioner's facts and those in *Washington* were nearly identical, habeas relief was properly denied.

REASONS FOR GRANTING THE WRIT

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") governs federal habeas review of the state court judgment. Under AEDPA, a writ will issue when the state court adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

This case raises a question about the application of the double jeopardy clause of the United States Constitution, where a trial court grants a mistrial on the basis of an "unnecessary" remark during defense counsel's opening statement.

In this matter, the trial court declared a mistrial absent the required "imperious necessity" review justifying the constitutional violation herein and, therefore, Petitioner's conviction is barred by double jeopardy principles. The trial court adjudication resulted in a decision that was contrary to clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). Specifically, the trial court arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law. *Williams v. Taylor*, ___ U.S. ___, ___, 120 S.Ct. 1495, 1520, 146 L.Ed.2d 389 (2000).

Both the United States and Michigan Constitutions prohibit a Defendant from being placed twice in jeopardy for the same offense. U.S. Const., Amends. V, XIV; Mich. Const. 1963, art. 1, § 15. Jeopardy attaches in a jury trial

once the jury is impaneled and sworn. *Critz v. Bretz*, 437 U.S. 28, 38, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); *People v. Brower*, 164 Mich. App. 242, 245, 416 N.W.2d 397 (1987), *lv. den.*, 430 Mich. 864 (1988), *cert. den.*, 488 U.S. 933 (1988). Because double jeopardy protection attaches before the end of a trial, a trial court's declaration sua sponte of a mistrial bars retrial of a Defendant unless the mistrial was prompted by an imperious or manifest necessity. *Downum v. United States*, 372 U.S. 734, 83 S.Ct. ___, 10 L.Ed.2d 100 (1963); *People v. Dawson*, 431 Mich. 234, 252, 427 N.W.2d 886 (1988); *People v. Rutherford*, 208 Mich. App. 198, 202, 526 N.W.2d 620 (1994); *People v. Echavarria*, 233 Mich. App. 356, 362-63 (1999). Therefore, a trial court should avoid declaring a mistrial sua sponte without first holding a hearing on the record and making explicit findings that no reasonable alternative exists. *People v. Benton*, 402 Mich. 47, 61, 260 N.W.2d 77 (1977).

"The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances.'" *Downum v. United States*, *supra* at 103, citing Mr. Justice Story in *United States v. Coolidge*, 25 Fed. Cas. 622, 623. "For the prohibition of the Double Jeopardy Clause is not against being twice punished, but against being twice put in jeopardy." *Downum v. United States*, *supra* at 103, citing *United States v. Ball*, 163 U.S. 662, 669.

The Sixth Circuit's order affirming Petitioner's conviction finds that the "holding of *Washington* is precisely on point for this matter," reasoning on the one hand that "[w]here Washington's attorney improperly referred to prosecutorial misconduct in a prior proceeding, Jorgensen's counsel risked fostering bias within the jury by improperly casting suspicion upon the victim's father." On the second

hand, the Sixth Circiut found that like the trial court in *Washington*, the trial court herein exercised diligence in making its determination on the motion for mistrial. *Arizona v. Washington*, 434 U.S. 497 (1977).

Petitioner disagrees with the Sixth Circuit's finding of striking similarity between the two cases on both counts.

First, the comments from defense counsel did not "improperly cast suspicion upon the victim's father." In fact, defense counsel specifically stated that the victim, and the other children in the household, had never known what it was to have a father, because he had been in prison serving time for rape. Therefore, the query becomes: How can defense counsel cast suspicion on a man who has never met his child, the complainant?

This same rationale was raised by counsel while objecting to the mistrial, submitting that a curative instruction would correct any supposed error because he had given the remark within the context of Petitioner being the first male disciplinarian, or "father figure," known to the complainant, because the biological father is serving a prison sentence.

Second, the comparison of the trial court's mistrial hearing in *Washington* to that of Petitioner's herein is disingenuous. When Petitioner's trial court was confronted with the motion for mistrial, her initial response was: "Are you going to be able to tie this and connect it up somehow in theory?"

From thereon, the trial court entertained the prosecution's motion with little consideration given to defense counsel's request for an alternative remedy. The debate focused on whether some jurors might believe that such a

comment may have set a stage of sexual abuse in the family. The trial court believed that "people draw different conclusions and have different inferences," or, as the prosecutor argued, "[T]hat the whole family must be messed up because their dad is in prison for rape." Again, however, the record clearly bears forth that defense counsel did not interject a portrait of sexual abuse in the family dating back to the biological father, but, instead, he said merely that Petitioner was the only father these children had known. During this one-sided mistrial hearing, the prosecutor argued that he would have made the motion for mistrial even if defense counsel had referred to the father serving time on a robbery conviction. This assertion indicates that the prosecutor was unable to quantify the possible prejudice to his case but, instead, made his motion simply because he did not like defense counsel's remark.

At one point, while defense counsel was attempting to argue the merit of a curative instruction, due to the fact that, at worst case, his unfortunate reference explained why the kids had not had a male disciplinarian in the home while growing up, the trial court responded, in a bizarre twist, that because the father was not going to testify at trial and give an explanation "of what really happened" giving rise to his rape conviction that, therefore, the motion for mistrial is granted. The trial court's contemplation that the alleged prejudice could be cured by the real-life testimony of the convicted-rapist-biological father, however, not by a curative instruction, as requested by defense counsel, is illogical.

Moreover, the Sixth Circuit's meaning in its finding that "[a]s in *Washington*, the trial judge here did not specifically hold that 'manifest necessity' justified her

order of a mistrial – though she did offer to 'use the legal terminology . . . if you need those legal words to say that right now,'" is somewhat unclear.

It is true that the trial court here did not use the words "manifest necessity." However, she did not offer to use the legal terminology until defense counsel brought a motion to dismiss prior to the commencement of Petitioner's second trial. Thus, it seems, the Sixth Circuit is supplanting the trial court's attempt to "make a record" during a subsequent motion to dismiss, with her initial hearing on the motion for mistrial. The Sixth Circuit failed apparently to focus on the lack of reasoning given by the trial court, after hearing perfunctory argument from counsel, during the initial grant of the mistrial herein.

The grant of mistrial in *Washington* is factually distinguished from this case. When Justice Stevens delivers the opinion in *Washington*, he reasons:

> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. . . . The trial judge, of course, may instruct the jury to disregard the improper comment. . . . Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. . . . The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power. . . .

Unlike in *Washington*, the trial court herein was not confronted with defense counsel's personal attack on the trial prosecutor's integrity during opening statement. Nor

is there any indication that defense trial counsel was unscrupulous, deliberately tainting the jury, such as in *Washington*. Nor is there any showing of a plausible frustration of the public interest in a judgment reached by an impartial tribunal. Nor did the trial court make an effort at holding a hearing as to whether a curative instruction would have removed alleged taint.

In this case, each time defense counsel explained the context of his statement, and reminded the court and the prosecution, that the reference was made in conjunction with the complainant never having known his biological father, his explanation was received with dismissive indifference: "I don't know if that ever came up." Is not "not knowing" reason enough to hold a more extensive hearing prior to granting a mistrial, in light of the constitutional considerations. The *Washington* court was mindful of the magnitude of its decision. Petitioner's trial court had no such concern. Further, the trial court in its grant of a mistrial, at best found defense counsel's statement "unnecessary."

In affirming Petitioner's judgment, the Sixth Circuit has equated "unnecessary" with "manifest or imperious necessity"; equated "no probative value" with "very extraordinary and striking circumstances."

This Petitioner prays this Honorable Court will correct the Sixth Circuit's misapplication of *Washington* to Petitioner's facts herein. The Court of Appeals for the Sixth Circuit has joined the Michigan Courts in adjudicating a result contrary to clearly established Federal law, as determined by this Supreme Court in *Arizona v. Washington*.

CONCLUSION

Petitioner's conviction and judgment of sentence must be reversed and dismissed because the trial court abused its discretion when declaring a mistrial absent an imperious or manifest necessity. The trial court's finding that defense counsel's statement was unnecessary and "could have" prejudiced the jury does not meet the "extraordinary and striking" threshold of *Washington*. Moreover, the trial court failed to adequately hold a hearing to discuss alternatives to this most drastic remedy. The trial court's abuse of discretion in refusing to take appropriate protective measures to ensure Petitioner's safeguard from double jeopardy, now requires this Honorable Court to grant Petitioner his writ of certiorari as his conviction is barred by the United States and Michigan Constitutions.

WHEREFORE, for the above stated reasons, Petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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DATED: May 19, 2004

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 02-2155

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRY JORGENSON,

Petitioner-Appellant,

v.

JOHN CASON, Warden,

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan

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Before: **KENNEDY** and **GIBBONS**, Circuit Judges; **ALDRICH**, District Judge.*

(Filed Feb. 19, 2004)

ALDRICH, J. Petitioner Terry Jorgenson ("Jorgenson") seeks a writ of habeas corpus, arguing that his conviction for criminal sexual conduct in a Michigan court violated the protection against double jeopardy provided to him by the Fifth and Fourteenth Amendments to the United States Constitution. The United States District Court for the Eastern District of Michigan upheld Jorgenson's conviction and denied habeas relief. For the following reasons, we AFFIRM the district court's decision.

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

I. Background

Jorgenson was accused of sexually assaulting his 13-year-old stepson, Benjamin Horne, between October 1998 and December 1998. Jorgenson was tried in December 1999 for eight counts of "criminal sexual conduct – first degree," in violation of Michigan Compiled Laws § 750.520b. After the jury in this proceeding was sworn and impaneled, the parties gave their opening statements.

Defense counsel's opening statement referred to the fact that Horne's biological father had been incarcerated for the crime of rape. Defense counsel stated, in pertinent part:

> But when [Terry] married Karleen Jorgenson, he also married three stepchildren. What he married into is some stepkids who didn't have a father. You're probably going to hear that their father was convicted of rape and sent to prison for rape, their biological father. So Terry's the stepdad, and his job now is to raise these children, children who have never known what it is to have a father, whose own biological father at that time was serving time for rape in prison.

J.A. at 242.

After defense counsel's opening statement, the prosecution moved for a mistrial, arguing that the references to the victim's father's incarceration for rape were irrelevant and highly prejudicial. The trial court agreed, finding that the statement by defense counsel had "no probative value" and "was an unnecessary comment that . . . creates a thought process that these kids are around sex all the time and they had a father that did it and . . . got put it [sic] prison for it." She rejected defense counsel's suggestion

that any prejudice to the jury caused by the remark could be alleviated by means of a curative instruction, observing that "you can't unring a bell."

When Jorgenson was again brought to trial for eight violations of MCL § 750.520b, his counsel moved to dismiss the charges, arguing that re-trial would violate Jorgenson's constitutional protection from double jeopardy. The trial court held a hearing on the matter, then denied the motion to dismiss. Jorgenson then filed an emergency application for leave to appeal with the Michigan Court of Appeals, but this application was denied.

The second trial commenced on December 14, 1999. On December 15, 1999, Jorgenson pled guilty to three counts of "criminal sexual conduct – first degree." Jorgenson was sentenced to concurrent terms of twenty to forty years' imprisonment. (He is now a prisoner at the Mound Correctional Facility in Detroit, Michigan.)

After sentencing, Jorgenson filed an application for leave to appeal with the Michigan Court of Appeals, asserting that the trial court abused its discretion in denying his motion to dismiss on double jeopardy grounds. The Michigan Court of Appeals denied this application, as did the Michigan Supreme Court.

On October 26, 2001, Jorgenson filed his petition for habeas relief with the United States District Court for the Eastern District of Michigan. That court denied relief without a hearing in an order on August 27, 2002, finding that "the trial court rendered a reasonable decision to grant the mistrial after full consideration of the relevant facts and circumstances." Jorgenson filed a notice of appeal on September 20, 2002, and on September 26, 2002, the district court issued a certificate of appealability.

In his appeal, Jorgensen raises a single issue: whether the statement of defense counsel created "manifest necessity" for a mistrial. If it did not, then the second criminal proceeding, following the grant of a mistrial over Jorgensen's objection, violated his constitutional protection against double jeopardy.

II. Discussion

We review the district court's legal conclusions regarding a habeas petition *de novo* and the district court's factual findings for clear error. *Vincent v. Jones,* 292 F.3d 506, 510 (6th Cir. 2002); *Simpson v. Jones,* 238 F.3d 399, 405 (6th Cir. 2000). The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2241 *et seq.,* also govern this case. AEDPA dictates that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (2003).

Jorgenson does not claim that the proceedings in Michigan state courts resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. Instead, he claims that the proceedings "resulted in a decision that was contrary to clearly established Federal law . . . Specifically, the trial court arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law." This Court will therefore turn its attention to the relevant language in section § 2254(d)(1).

Justice O'Connor, writing for the Supreme Court in *Williams v. Taylor,* 529 U.S. 362 (2000), explained the "contrary to" language of this section as follows:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Id. at 405-406.

There appears to be some doubt about the proper interpretation of "clearly established Federal law, as determined by the Supreme Court" – specifically, courts have disagreed over the role to be allotted to federal appellate and state court rulings under AEDPA. *See Herbert v. Billy,* 160 F.3d 1131, 1135 (6th Cir. 1998) ("[A] district court or court of appeals no longer can look to lower federal court decisions in deciding whether the state decision is contrary to . . . federal law"): *Harris v. Stovall,*

212 F.3d 940, 944 (6th Cir. 2000) (reemphasizing same point). *But see Doan v. Brigano,* 237 F.3d 722, 734 (6th Cir. 2001) (finding circuit precedent "worth noting"): *Duhaime v. Ducharme,* 200 F.3d 597, 600-01 (9th Cir. 1999) (circuit cases "may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help . . . determine what law is 'clearly established.'").

However, such disputes need not impact the disposition of this case. A series of Supreme Court opinions has carefully outlined the standards to be applied in considering the propriety of a trial judge's grant of a mistrial, and the most influential Supreme Court ruling on the issue sprang from a set of facts bearing remarkable similarity to those now before this Court. Given this similarity, this Court cannot conclude that the state court confronted "a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrive[d] at a result different from" Supreme Court precedent.

It has long been settled that the Constitution's prohibition against twice subjecting a defendant to jeopardy for the same offense applies to state court proceedings, *Benton v. Maryland,* 395 U.S. 784, 794 (1969), and that this prohibition absolutely bars a state from conducting a second trial following any acquittal. *Fong Foo v. United States,* 369 U.S. 141, 143 (1962). Jeopardy also attaches before a judgment becomes final, *United States v. Jorn,* 400 U.S. 470, 479 (1971); *Illinois v. Somerville,* 410 U.S. 458, 471 (1973), though in cases where a trial is aborted short of its final stages, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair

trials designed to end in just judgments." *Wade v. Hunter,* 336 U.S. 684, 689 (1949).

In *Arizona v. Washington,* 434 U.S. 497 (1977), the Supreme Court addressed the issue of double jeopardy as it applies to proceedings terminated before completion by a grant of mistrial over defendant's objection. Justice Stevens, delivering the opinion of the Court, wrote:

> Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant. . . .
>
> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden. . . . Nevertheless, those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge.

Id. at 505-06.

The "particular problem" confronting the trial judge in *Washington* was almost identical to the issue before Judge

Chrzanowski in this matter. As Justice Stevens summarized: "the trial judge ordered a mistrial because the defendant's lawyer made improper and prejudicial remarks during his opening statement to the jury." *Id.* at 510. Where Washington's attorney improperly referred to prosecutorial misconduct in a prior proceeding, Jorgenson's counsel risked fostering bias within the jury by improperly casting suspicion upon the victim's father.

As in *Washington,* the trial judge here declined to issue a curative instruction, believing such a remedy to be insufficient to address potential bias. As in *Washington,* the trial judge here did not specifically hold that "manifest necessity" justified her order of a mistrial – though she did offer to "us[e] the legal terminology . . . if you need those legal words to say that right now."

To quote Justice Stevens:

> We recognize that the extent of the possible bias cannot be measured, and that . . . some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment. . . .
>
> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted.

> The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel, or even remove him from the trial . . . Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop . . . professional misconduct.

434 U.S. at 511-13 (citations omitted).

In this case, the trial judge heard argument from both sides regarding the (im)propriety of defense counsel's opening statement and the need for a mistrial. Similar conduct proved useful in persuading the *Washington* Court that the judge acted out of manifest necessity:

> Defense counsel aired improper and highly prejudicial evidence before the jury, the possible impact of which the trial judge was in the best position to assess. The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both

> defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. Since he exercised "sound discretion" in handling the sensitive problem of possible juror bias created by the improper comment of defense counsel, the mistrial order is supported by the "high degree" of necessity which is required in a case of this kind. Neither party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, the public's interest in fair trials designed to end in just judgments must prevail over the defendant's valued right to have his trial concluded before the first jury impaneled.

434 U.S. at 514-16 (citations omitted).

The holding of *Washington* is precisely on point for this matter, and it has not been reversed, limited, or otherwise controverted. The facts of the case are almost identical to those before the Court. As such, we find that the trial court confronted "a set of facts . . . materially indistinguishable from a decision of [the Supreme] Court" and arrived at an analogous result. The scenario is therefore precisely opposite to that required for Jorgenson to prevail, and habeas relief was properly denied. *Williams v. Taylor*, 529 U.S. at 407.

III. Conclusion

For the foregoing reasons, the decision of the district court upholding Jorgenson's conviction and denying habeas relief is **affirmed**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TERRY JORGENSEN,

Petitioner,

v.

JOHN CASON,

Respondent. /

CIVIL ACTION NO. 01-CV-60226AA
HONORABLE MARIANNE O. BATTANI

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Petitioner Terry Jorgensen, a state prisoner currently confined at the Mound Correctional Facility in Detroit, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C.§ 2254 alleging that he is incarcerated in violation of his constitutional rights. Petitioner pleaded guilty to three counts of first-degree criminal sexual conduct in the Macomb County Circuit Court in 1999. He was sentenced to concurrent terms of 20 to 40 years imprisonment on those convictions. Petitioner, through counsel, asserts that his convictions violate the Double Jeopardy Clause of the United States Constitution because the trial court improperly granted a mistrial after the jury was impaneled in his initial trial and allowed the prosecution to re-institute the criminal sexual conduct charges, which led to his plea-based convictions. For the reasons stated below, the petition for a writ of habeas corpus is denied.

II. Facts and Procedural History

Petitioner's convictions stem from the sexual assault of his 13-year-old stepson, Benjamin Horne, in their Shelby Township home from October through December, 1998. Petitioner initially proceeded to trial on eight counts of first-degree criminal sexual conduct in December, 1999. After the jury was sworn and impaneled, the parties gave their opening statements. During his argument, defense counsel told the jury that the victim's biological father was in prison for rape, stating in relevant part:

> But when he married Karleen Jorgensen, he also married three stepchildren. What he married into is some stepkids who didn't have a father. You're probably going to hear that their father was convicted of rape and sent to prison for rape, their biological father. So Terry's the stepdad, and his job now is to raise these children, children who never known what it is to have a father, whose own biological father at that time was serving time for rape in prison.

12/2/99 Trial Tr., p. 13.

After defense counsel completed his opening statement, the prosecution moved for a mistrial, contending that the references to the victim's father were irrelevant and highly prejudicial. Defense counsel objected to the grant of a mistrial, arguing that the comment was insignificant and that any prejudice could be alleviated with a curative instruction. The trial court rejected the remedy of a curative instruction, noting that "you can't unring a bell," *id.* at 22, and granted the motion for mistrial. The trial court found tht the rape comment had no probative value and "was an unnecessary comment that . . . creates a thought process that these kids are around sex all the time

and they had a father that did it and . . . got put in prison for it." *Id.* at 24.

Defense counsel subsequently moved to dismiss the charges, claiming that re-trial was barred on double jeopardy grounds. The trial court conducted a hearing and heard the arguments of both parties. At the conclusion of the hearing, the court denied the motion, stating:

> The Court did make its finding when it declared the mistrial. Granted, I may not have used the legal terminology of, "Finding a manifest necessity justifying a mistrial," I will, if you need those legal words to say that right now, becaue based upon up analysis, I felt that the jury could have been prejudiced.
>
> I'm not convinced that there would be any double jeopardy attached, even though the jury was indeed impaneled, and your motion is denied.

12/7/99 Motion Hrg., p. 12. The court scheduled a new trial for the following week so that Petitioner could seek interlocutory relief.

Defense counsel filed an emergency application for leave to appeal with the Michigan Court of Appeals, which was denied "for failure to persuade the Court of the need for immediate appellate review." *People v. Jorgensen,* No. 223919 (Mich. Ct. App. Dec. 13, 1999).

On December 15, 1999, Petitioner pleaded guilty to three counts of first-degree criminal sexual conduct in exchange for the dismissal of five additional counts and a sentencing recommendation of no more than 10 years imprisonment on the minimum terms. The trial court subsequently rejected the recommendation and sentenced

Petitioner to three concurrent terms of 20 to 40 years imprisonment.

Following sentencing, Petitioner filed an application for leave to appeal with the Michigan Court of Appeals asserting that the trial court abused its discretion in denying his motion to dismiss the charges based upon double jeopardy principles. The Michigan Court of Appeals denied leave to appeal "for lack of merit in the grounds presented." *People v. Jorgensen,* No. 225307 (Mich. Ct. App. May 11, 2000) (unpublished). Petitioner then filed an application for leave to appeal with the Michigan Supreme Court raising the same claim, which was denied in a standard order. *People v. Jorgensen*, 463 Mich. 903, 618 N.W.2d 912 (2000).

Petitioner, through counsel, filed the present petition on October 26, 2001 asserting that Petitioner's convictions were obtained in violation of the protection against double jeopardy. Respondent filed an answer to the petition on May 15, 2002, asserting that the petition should be denied for lack of merit.

III. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified 28 U.S.C.§ 2241 *et seq.*, governs this case because Petitioner filed his petition after the AEDPA's effective date. *See Lindh v. Murphy,* 521 U.S. 320, 336 (1997). The AEDPA provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the

> merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1996).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the United States Supreme Court undertook a detailed analysis of the correct standard of review under the AEDPA. According to the Supreme Court:

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing principle from

> this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 412-13 (O'Connor, J., delivering the opinion of the Court on this issue).

In evaluating a state court decision under the "unreasonable application" clause, the Supreme Court further stated that a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 411. "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*

The Supreme Court also clarified that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States," refers only to "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Id.* at 412. In determining what constitutes clearly established federal law, therefore, a federal habeas court must look to pertinent United States Supreme Court precedent.

Lastly, this Court must presume that state court factual determinations are correct. 28 U.S.C.§ 2254(c)(1). A habeas petitioner may rebut this presumption only with clear and convincing evidence. *See Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

IV. Analysis

Petitioner's sole claim upon habeas review is that his convictions violate double jeopardy because the trial court erred in declaring a mistrial after his jury was impaneled. The Fifth Amendment to the United States Constitution commands that no "person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction and protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Double Jeopardy Clause also precludes the State from making repeated attempts to convict an individual for an alleged offense, *United States v. Dinitz*, 424 U.S. 600, 606 (1976), and protects a defendant's right to have his trial completed by a particular tribunal. *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978). Jeopardy attaches in a criminal trial once the jury is impaneled and sworn. *See, e.g., Critz v. Bretz*, 437 U.S. 28, 38 (1978).

When a criminal proceeding is terminated prior to a resolution on the merits, however, retrial is not automatically barred. Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury may proceed only if the defendant requests or consents to a mistrial or if there is a "manifest necessity" for a mistrial. *Arizona*, 434 U.S. at 505; *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824); *Watkins v. Kassulke*, 90 F.3d 138, 141 (6th Cir. 1996). Given that Petitioner neither requested nor consented to the mistrial in this case, the only issue before the Court is whether manifest necessity existed for the grant of the mistrial.

"Manifest necessity" does not mean absolute necessity, but rather a "high degree" of necessity dependent upon the specific facts and circumstances of each case. *Arizona*, 434 U.S. at 506. The manifest necessity doctrine does not require a finding that the trial court had no alternative but to declare a mistrial. *Harpster v. State of Ohio*, 128 F.3d 322, 328 (6th Cir. 1997). Reviewing courts must give considerable deference to a trial court's determination that manifest necessity warrants a mistrial. *Arizona*, 434 U.S. at 511. A trial court's failure to make an explicit finding of manifest necessity, however, does not negate the propriety of a mistrial as long as such a determination is supported by the record. *Id.* at 516-17; *United States v. Gantley*, 172 F.3d 422, 429 (6th Cir. 1999).

Having considered the matter, this Court concludes that the trial court's decision to declare a mistrial is consistent with Untied States Supreme Court precedent and constitutes a reasonable application of federal law. In *Arizona v. Washington*, the United States Supreme Court was faced with a situation in which defense counsel erroneously referred to the prosecution's failure to disclose evidence in a prior proceeding during opening statements. In concluding that the trial court properly exercised its discretion in declaring a mistrial, the Supreme Court noted the prejudice that arises from an improper opening statement and the difficulty of negating its effect upon the jury:

> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted. The trial

> judge, of course, may instruct the jury to disregard the improper comment. In extreme cases he may discipline defense counsel, or even remove him from the trial. . . . Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument.

Arizona, 434 U.S. at 512-13.

In this case, the trial court concluded that a mistrial was warranted due to defense counsel's opening statement to the jury that the victim's biological father was serving a prison sentence for rape. The trial court acted within its discretion in finding that potential juror bias was created by defense counsel's remarks. Petitioner was charged with eight counts of first-degree criminal sexual conduct involving his 13-year-old stepson. From defense counsel's statement, the jury could have improperly inferred that the victim was abused by his biological father or that he was exposed to sexual/violent activity at a young age, causing him to make untruthful accusations against Petitioner. The potential for tainting the entire jury panel was significant. *See, e.g., Graves v. Gerraghty*, 618 F. Supp. 1348, 1355-56 (E.D. Va. 1985) (mistrial proper where defense counsel referred to prior consensual sexual conduct between defendant and sexual assault victim in violation of state's tape shield law in opening statements). Further, the trial court acted within its discretion in finding that a cautionary instruction could not "unring the bell" and would not sufficiently alleviate the prejudice to the prosecution created by defense counsel's unwarranted remarks. The court declared the mistrial and denied Petitioner's dismissal motion only after hearing arguments from both parties and rejecting alternative remedies. This Court is satisfied that the trial court rendered a reasonable

decision to grant the mistrial after full consideration of the relevant facts and circumstances. Habeas relief is not warranted.

V. Conclusion

For the reasons stated, the Court concludes that Petitioner is not entitled to habeas relief on the claim presented. Accordingly, the Court **DENIES WITH PREJUDICE** the petition for writ of habeas corpus.

IT IS SO ORDERED.

/s/ Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES
DISTRICT JUDGE

DATED: Aug. 27, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TERRY JORGENSEN,

Petitioner,

v.

JOHN CASON,

Respondent. /

CIVIL ACTION NO. 01-CV-60226AA
HONORABLE MARIANNE O. BATTANI

JUDGMENT

The above-entitled matter having come before the Court on a Petition for a Writ of Habeas Corpus, Honorable Marianne O. Battani, United States District Judge, presiding, and in accordance with the Opinion and Order entered on Aug. 27, 2002;

IT IS ORDERED AND ADJUDGED that the Petition for a Writ of Habeas Corpus is **DENIED AND DISMISSED WITH PREJUDICE.**

SO ORDERED.

/s/ Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

DATED: Aug. 27, 2002